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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 76-682

SANTA CLARA PUEBLO, *et al.*,

Petitioners,

v.

JULIA MARTINEZ, *et al.*,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF THE SHOSHONE AND ARAPAHOE TRIBES OF THE WIND RIVER INDIAN RESERVATION, AND THE NATIONAL CONGRESS OF AMERICAN INDIANS AS *AMICI CURIAE*

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INTEREST OF *AMICI*

This brief is submitted with the written consent of all parties to the case, lodged with the Clerk. See Rule 42(2) of the Rules of this Court. *Amici*, two major Indian tribes and the principal national organization of Indian tribes, are interested in this case to protect themselves and their members from any expansion of the liability of Indian tribes to suit without their consent, not specifically provided by Congress, and to protect the authority of Indian tribes over their own membership standards.

QUESTIONS PRESENTED

1. Whether Congress by enactment of the Indian Civil Rights Act of 1968 (25 U.S.C. 1301-1303) waived the immunity of Indian tribes and their officers from suits, other than by writ of habeas corpus?
2. Whether under the Indian Civil Rights Act, Federal courts may alter tribal membership standards?
3. Whether the particular membership ordinance at issue here is violative of the equal protection standard of the Act?

STATEMENT

A 1939 enrollment ordinance of the Santa Clara Pueblo grants membership to "children born of marriages between male members of the Santa Clara Pueblo and non-members . . . ." and precludes membership for "[c]hildren born between female members of the Santa Clara Pueblo and non-members. . . ." 540 F.2d 1039 at 1040. The ordinance was enacted "in response to a marked increase in marriages between Pueblo members and non-members" which "had been rare" before 1939. (*Ibid.*) The court of appeals found that:

> "The increase in mixed marriages produced concern about the enlarged demands for allocation of land and other tribal resources. The Pueblo's elders were apprehensive that the population increase resulting from intermarriage would strain the Pueblo's finite resources." (*Ibid.*)

The Santa Clara Pueblo is traditionally a patrilineal and patrilocal society. (*Id.* at 1041; 402 F. Supp. at 16).

The Indian Civil Rights Act of 1968, 25 U.S.C. 1302, provides that:

> No Indian tribe in exercising powers of self-government shall –
>
> * * *
>
> (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law; * * *

In a suit brought against the Pueblo (tribe) and its governor, the court of appeals held that the Pueblo ordinance was invalid because it contravenes the equal protection clause of the Act (540 F.2d *supra* at 1048).

The Act contains only the following judicial review provision:

> "The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe" (25 U.S.C. 1303.)

The court below concluded that the Act implicitly waived tribal immunity from suit (540 F.2d *supra* at 1042) and empowered Federal courts to review tribal membership standards (540 F.2d *supra* at 1047-1048).

ARGUMENT

I.

THE PUEBLO AND ITS GOVERNOR ACTING IN HIS OFFICIAL CAPACITY ARE IMMUNE FROM SUIT EXCEPT TO THE EXTENT THAT THEY MAY BE DEFENDANTS IN A PROCEEDING FOR A WRIT OF HABEAS CORPUS.

The principle that Indian tribes, and their councils or executive officers acting within their lawful authority, are immune from suit derives from the status of Indian tribes as governmental entities. Indian tribes are treated in the United States Constitution *in pari materiae* with states and foreign nations. Art. I, Sec. 8, cl. 3. This Court while recognizing Congress' plenary authority over Indian Tribes and trust responsibility toward them, has also continuously recognized the tribes' residual sovereignty, *e.g.*, *Worcester v. Georgia*, 6 Pet. 515 (1832); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 168-173 (1973); *United States v. Mazurie*, 419 U.S. 544 (1975), and their immunity from suit, *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940); *Puyallup Tribe, Inc. v. Department of Game of Washington*, decided June 23, 1977, Slip Op. at 6.

Immunity from suit is important to tribal existence and to the perpetuation of Indian culture. Immunity is far more significant for a tribe than for a State or the Federal Government because of the tribes' more limited resources. Tribes lack a substantial tax base. Nor can they print money. As a court of appeals long ago recognized:

> "As rich as the Choctaw Nation is said to be in lands and money, it would soon be impoverished if

> it was subject to the jurisdiction of the courts and required to respond to all the demands which private parties chose to prefer against it." *Thebo v. Choctaw Tribe of Indians*, 66 Fed. 372, 376 (C.A. 8, 1895)

For this reason, the court in *Thebo* held that a waiver of immunity of an Indian tribe must be in "plain and unambiguous terms."

Amici do not dispute the plenary power of Congress to alter the traditional rules, however well established, of tribal immunity from suit and tribal control over membership. Congress *could* open tribal treasuries to damage actions, subject tribal officers to federal court injunctions, authorize federal courts to set aside tribal membership standards or even provide its own membership criteria. But this Court has consistently held that Congress must clearly indicate an intention to modify or abrogate long established Indian rights for those rights to be modified. *Rosebud Sioux Tribe v. Kneip*, decided April 4, 1977, Slip Op. 2-3; *Menominee Tribe v. United States*, 391 U.S. 404 (1968); *Squire v. Capoeman*, 351 U.S. 1, 7 (1956).

Nothing in the language of the Indian Civil Rights Act alters a tribe's immunity from suit of its officers, except in habeas corpus proceedings. Nothing in the

legislative history of the Act suggests such a Congressional intent. Indeed, both the language and history of the Act indicate that Congress considered and rejected more expansive Federal judicial review of the actions of tribes. Nor does the purpose of the Act require the result reached by the lower court. *Amici* accordingly submit that – until and unless Congress clearly speaks – tribal immunity from suit, except by habeas corpus, and tribal control over membership standards, should remain unimpaired.

A. Congress Provided a Specific Remedy – Habeas Corpus – and Considered, Then Rejected, More Extensive Remedial Provisions for Violations of the 1968 Act.

Unlike the civil rights statute considered in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (42 U.S.C. 1982) or the constitutional provisions at issue in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), the Indian Civil Rights Act provides a specific and single Federal judicial remedy for violations of its terms. Section 1303 of Title 25, U.S.C. provides:

> "The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe."

The presence of this single, specific, remedy indicates that Federal judicial review was provided only where a tribe has deprived a person of liberty.

This conclusion –while at variance with decisions by lower courts[1] – is fortified by the legislative history of

[1]This Court has not considered whether the traditional immunity of tribes from suit was waived by the 1968 Act. Most decisions of courts of appeal in abstract situations before trial on

[footnote continued]

the 1968 Act. After several hearings in two earlier Congresses,[2] Senator Ervin introduced a number of separate bills in 1965 that ultimately became the basis for the 1968 Indian Rights Act. The substantive

the merits have held that federal courts have jurisdiction over alleged tribal violations of the Indian Civil Rights Act regardless of whether habeas corpus was sought. E.g., *Dry Creek Lodge, Inc. v. United States*, 515 F.2d 926, 932-934 (C.A. 10 1975); *Johnson v. Lower Elwha Tribal Community*, 484 F.2d 200, 202-203 (C.A. 9, 1973); *Luxon v. Rosebud Sioux Tribe*, 455 F.2d 698, 700 (C.A. 8, 1972); But see *Wounded Head v. Tribal Council of the Oglala Sioux Tribe*, 507 F.2d 1079 (C.A. 8, 1975); *Slattery v. Arapahoe Tribal Council*, 453 F.2d 278 (C.A. 10, 1971). This conclusion has been reached usually in reliance on 28 U.S.C. 1343 (4) and cases such as *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, and *Bivens v. Six Unknown Named Agents*, 403 U.S. 388.

28 U.S.C. 1343 reads:

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> * * *
>
> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

This statute, standing alone, does not waive sovereign immunity, *Corbean v. Xenia City Board of Education*, 366 F.2d 480 (C.A. 6, 1966), and the limited grant of jurisdiction in 25 U.S.C. 1303 is inconsistent with a waiver of sovereign immunity.

Most commentators on the Act have been critical of the lower courts' broad jurisdictional rulings. Ziontz, *In Defense of Tribal Sovereignty: An Analysis of Judicial Error in Construction of the Indian Civil Rights Act*, 20 S. Dak. L.Rev. 1 (1975); Lazarus, *Title II of the 1968 Civil Rights Act*, 45 N. Dak. L.Rev. 337 (1969); see also Price, quoted at p. 11 *infra*.

[2]Hearings were held in 1961, 1962 and 1963 before the Senate Judiciary Subcommittee on Constitutional Rights. Hearings Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, U.S. Senate: Constitutional Rights of the American Indian, 87th Cong., 1st sess., Pts.1 and 2

[footnote continued]

guarantees that became 25 U.S.C. 1302 were included in S. 961.[3] Importantly, S. 962 authorized appeals of *all* tribal court criminal convictions to federal district courts with the right of trial de novo. And S. 963 empowered the Attorney General to investigate complaints of denial of constitutional rights of Indians by tribes and to bring appropriate criminal *or civil* actions to vindicate the rights denied.

These last two bills *did not pass.* They were opposed by the Interior Department, *inter alia* on the grounds that they would unnecessarily burden the federal court system.[4] The present habeas corpus provision of

(1961); Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, Constitutional Rights of the American Indian, 87th Cong., 2d sess., pt. 3 (1962); Hearings Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary. United States Senate: Constitutional Rights of the American Indian, 88th Cong., 1st Sess., pt 4 (1963).

[3]As originally introduced, S. 961 did not enumerate guarantees but simply provided:

> That any Indian tribe in exercising its powers of local self-government shall be subject to the same limitations and restraints as those which are imposed on the Government of the United States by the United States Constitution. (111 Cong. Rec. 1799 (1965))

It was modified and reported out in its present form by the Subcommittee as a new bill, S. 1843, 90th Cong., 1st sess. (1967)

[4]Hearings on S. 961, S. 962, S. 963, S. 964, S. 966, S. 967, S. 968, S.J. Res. 40, to Protect the Constitutional Rights of American Indians, Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 89th Cong., 1st Sess., at 19, 23 (1965) [hereinafter cited as 1965 Hearings] (Testimony of Frank Barry, Solicitor of the Department of the Interior).

[footnote continued]

Section 1303 was added to the bill as a replacement for them, again at the Interior Department's recommendation.[5] The modified bill was reported out of committee, and passed the Senate in 1967.[6] Afterwards, the Senate added the entire bill as an amendment to the House-passed civil rights bill, and the House accepted the amendment.[7]

The *only* consideration Congress gave to opening the Tribes to civil suits was rejection of the provision that would have permitted the Attorney General to bring such suits. Similarly, full federal judicial review of criminal convictions was considered and also rejected. As passed, the Act limits judicial review of tribal actions to habeas corpus proceedings. This represents a balancing by Congress of many factors after years of hearings: protection of individual's constitutional rights, the burden on the federal judiciary of review of tribal actions, the desire to limit interference with tribal court systems and exercise of tribal governmental functions, and the traditional immunity of tribal governments from suit.

Apparently, the Subcommittee was initially inclined to press ahead with S. 962. Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, Summary Report of Hearings and Investigations: Constitutional Rights of the American Indian, 89th Cong., 2d Sess., 26 (1966). (hereafter cited as 1966 Senate Report.) No vestige of this bill, however, was contained in S. 1843 when passed in 1967.

As originally introduced, S. 1843 did contain a limited provision for federal judicial review of *criminal* convictions by tribal courts where a denial of constitutional rights was involved.

[5]1965 Hearings at 24 (Barry testimony), 318.

[6]S. Rep. No. 841, 90th Cong., 1st sess. (1967); 113 Cong. Rec. 13474-13475 (1967).

[7]114 Cong. Rec. 5992, 9621 (1968).

B. Expansion of Federal Judicial Review is Not Necessary to Achieve the Purposes of the Act.

Expansion of federal judicial review beyond what Congress set forth is not necessary to achieve the purposes of the 1968 Act. Some lower courts have suggested that – if judicial review were limited to habeas corpus – the provisions of the Act that do not relate to criminal detention would become "unenforceable," and "almost meaningless."[8] The opposite is true. The Act would remain enforceable in tribal courts where tribal actions were challenged.[9] Moreover, the Secretary of the Interior has extensive powers of review and approval of tribal ordinances, and would be obligated to disapprove ordinances inconsistent with the Act. See, e.g., 25 U.S.C. 476, 18 U.S.C. 1161.

The 1968 Act is not a single purpose statute, but has "twin, and possibly conflicting goals": greater protection of "individual rights of Indians, while fostering tribal self government and cultural identity." *Wounded Head v.*

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[8] E.g., *Johnson v. Lower Elwha Tribal Community*, 484 F.2d 200, 203 (C.A. 9, 1973); *Luxon v. Rosebud Sioux Tribe*, 455 F.2d 698 (C.A. 8, 1972). See also the decision below, *Martinez v. Santa Clara Pueblo*, 540 F.2d *supra*, 1048.

[9] The importance of tribal courts as legal institutions has often been recognized by this Court. See e.g., *Fisher v. District Court*, 424 U.S. 382, 386-389 (1976); *Williams v. Lee*, 358 U.S. 217, 220, 222 (1958). Congress in the 1968 Act, also directed the Secretary of the Interior to prepare a model code "to govern the administration of justice by courts of Indian offenses on Indian reservations." 25 U.S.C. 1311.

Tribal Council of Oglala Sioux Tribe, 507 F.2d, *supra*, at 1082. Congress clearly did not intend absolute federal protection of individual rights, at whatever cost to tribal culture and government.

The decision below, and similar lower court holdings, upset the balance arrived at by Congress, greatly enlarging federal court jurisdiction and interfering with tribal governmental processes. As the leading contemporary scholar of federal Indian law has written in reviewing decisions of the courts of appeals permitting federal judicial review of tribal actions:

> "The widespread consensus that there is subject matter jurisdiction is surprising in view of the sparseness of the statutory language and the absence of legislative history supporting jurisdiction. . . . The haste to find general federal subject matter jurisdiction arises out of the rather facile adoption of constitutional reasoning in the analysis of Civil Rights Act matters." Price, Monroe E., *Law and The American Indian: Readings, Notes and Cases*, pp. 748-749 (1973).

If the 1968 Act should prove insufficient to protect individual rights, Congress could address the question anew and decide whether Indian tribes should be subjected to the full burden of federal court litigation and potential damage awards.

II.

IF THE INDIAN CIVIL RIGHTS ACT PROVIDES FEDERAL JUDICIAL REVIEW OTHER THAN BY HABEAS CORPUS, SUCH REVIEW SHOULD BE LIMITED TO INJUNCTIVE RELIEF AGAINST TRIBAL OFFICERS.

If this Court holds that the Indian Civil Rights Act did implicitly waive tribal immunity to some degree, the waiver should be limited to tribal officers – not the Tribe itself. The distinction between permitting injunctive relief against a sovereign (through its officers) and permitting a judgment (often a money judgment) against the sovereign itself has been well established by this Court in *Ex parte Young*, 209 U.S. 123 (1908) and *Edelman v. Jordan*, 415 U.S. 651 (1974). These cases involve an interpretation of the Eleventh Amendment, but in a more fundamental way they concern the need to protect the treasury of a government while permitting injunctive relief to assure protection of civil rights. In *Ex parte Young*, the Supreme Court held that the Eleventh Amendment (which prohibits suits against the states in federal courts, except by the United States) does not bar an injunctive action against a state official. *Edelman* limited Young by adding that if the effect of the inunction is to require a payment from the treasury of the state itself, the claim is barred even though brought only against the official (415 U.S. at 673-674).[10]

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[10] Admittedly, the Eleventh Amendment is not literally applicable to a suit against an Indian tribe, but the principle that an Indian tribe's sovereign immunity can only be waived to the extent expressly provided by Congress serves the same purpose. E.g., *Thebo v. Choctaw Tribe of Indians*, 66 Fed. (supra) at 375-376.

Lower federal courts, by failing to adhere to the distinction between a tribe and its officials, have literally threatened tribes with bankruptcy and extinction.[11] In a recent case, for example, the Shoshone and Arapahoe Tribes were sued by private parties for some 24 million dollars as a result of a resolution by the tribal councils seeking federal assistance to prevent the plaintiffs from using a private road across tribal members' property without the members' consent. Jurisdiction was alleged and recognized by the Court of Appeals for the Tenth Circuit under the equal protection and due process clauses of the Indian Civil Rights Act. The United States District Court for the District of Wyoming on remand sustained a jury verdict for $500,000 against the Tribes. *Dry Creek Lodge v. Canan*, C74-74A. This award exceeds the annual income of most federally recognized Indian Tribes.

Although the respondents in this case have not sought money damages against the Pueblo, a holding by this Court that tribal immunity from suit has been waived by the Indian Civil Rights Act will encourage actions against tribes for money judgments, forcing relatively impoverished Tribes to divert limited funds from needed services to members to payment of attorneys' fees and judgments. Indian tribes, if left unprotected, are an open target for such suits. Federal trust responsibility for Indian funds is defeated by such actions. The policy of tribal immunity has heretofore protected Indian tribes from this result, and that

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[11] Most Indian Civil Rights Act decisions by courts of appeal have indiscriminately allowed relief against both the tribe and its officers, e.g., *Johnson v. Lower Elwha Tribal Community*, *supra*; *Brown v. United States*, 486 F.2d 658 (C.A. 8, 1973).

immunity should not be breached absent a very clear indication — lacking here — that Congress intends such a result.

III.

FEDERAL COURTS SHOULD NOT INTERFERE WITH TRIBAL MEMBERSHIP STANDARDS.

Even if this Court should hold that all aspects of tribal immunity from suit were dissolved by the 1968 Act, it should not interject the Federal judiciary into the internal tribal affair of setting membership criteria.

Since the Martinez children satisfy all other criteria for membership, the practical effect of the court of appeals decision is to direct the Pueblo to enroll them. This holding reverses two hundred years of Federal Court abstention in this delicate area of tribal membership standards, confirmed on at least three occasions by this Court. *Cherokee Inter-Marriage Cases*, 203 U.S. 76 (1906); *Roff v. Burney*, 168 U.S. 218 (1897); *Nofire v. United States*, 164 U.S. 657 (1897). See generally, *Cohen, Felix S. Handbook of Federal Indian Law*, pp. 133-137 (GPO 1942).

If the Federal courts are to review tribal membership determinations at all, this review should be limited to ensuring a non-discriminatory or "even-handed" application of tribal legislation. This has, in fact, been the approach of some lower courts which have reviewed membership and related determinations on the merits under the Indian Civil Rights Act. E.g., *Yellow Bird v. Oglala Sioux Tribe*, 380 F. Supp. 438 (D. S. Dak. 1973); *Daly v. United States*, 483 F.2d 700, 705, 706 (C.A. 8, 1973); see also *Wounded Head v. Tribal Council of the Oglala Sioux Tribe*, 507 F.2d, *supra*, at 1083; *Groundhog v. Keeler*, 442 F.2d 674 (C.A. 10, 1971).

Tribal membership, being akin to citizenship, is essentially a political determination subject to majoritarian control by the Tribes themselves. The nature of this determination counsels that it be left to the tribes (subject, of course, to the plenary power of Congress), or to the federal agencies expert in Indian affairs. Federal courts should not substantively intrude in as basic a matter of tribal culture and policy as the setting of membership standards.

IV.

THE PUEBLO ORDINANCE, IN ANY EVENT, SATISFIES THE 1968 ACT'S EQUAL PROTECTION PROVISION.

Lower courts seem generally in agreement that the equal protection clause of the 1968 Act should be applied differently from the Constitutional standard, and that tribal actions should be sustained where justified in terms of the tribal interest in maintaining a separate and unique Indian polity and society. [12]

While giving lip service to this principle, 540 F.2d, *supra* at 1047, the court of appeals invalidated the Pueblo ordinance because the Pueblo had not shown a "compelling" interest to support it. That is not the proper test as to distinctions based on gender even outside the Indian area.[13]

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[12] E.g., *Howlett v. Salish and Kootenai Tribes*, 529 F.2d 233, 238 (C.A. 9, 1976); *Means v. Wilson*, 522 F.2d 833, 842 (C.A. 8, 1975); *Wounded Head v. Oglala Sioux Tribal Council, supra*, 507 F.2d, *supra*, at 1083.

[13] *Schlesinger v. Ballard*, 419 U.S. 498, 505-510 (1975); *Geduldig v. Aiello*, 417 U.S. 484, 494-498 (1974); *Kahn v. Shevin*, 416 U.S. 351 (1974); *Reed v. Reed*, 404 U.S. 71 (1971).

Whether "compelling" or not the ordinance clearly has a rational basis. The Pueblo has limited lands and assets. Its people are poor. Just as this Nation limits its immigration, the Pueblo must limit its expansion of membership by intermarriage. No limitation will be entirely satisfactory but some must be made. The limitation at issue here is rational within the patrilineal system of the Tribe.

The court of appeals rejected the ordinance as "arbitrary and expedient" because it "originates from practical economic considerations." 540 F.2d, *supra*, at 1048. Just such considerations should sustain the ordinance. The Court of Appeals' reasoning would deny tribal government the authority to consider economic consequences in fashioning policy.

Similarly, the 38-year old ordinance was invalidated in part because it is "of relatively recent origin and so it does not merit the force that would be attributed to a venerable tradition." *Ibid.* Tribes, like other governments, must have the power to adapt policy to changing circumstances.

The decision of the court of appeals – because of its lack of familiarity with tribal institutions and Indian affairs – is premised on a near-complete derogation of tribal governmental powers and processes. The court's process of analysis reflects the wisdom of leaving the balancing of governmental choices by Indian tribes to the tribes themselves rather than federal courts.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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